NO. 48229-1-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JAMEZ E. BROWN,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COURT
The Honorable Erik D. Price, Judge
Cause No. 15-1-00292-2

BRIEF OF APPELLANT

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06. Whether, as a matter of law, the trial court erred in imposing a variable term of community custody that exceeded the statutory maximum for the crime of assault in the third degree? [Assignment of Error No. 6].

C. STATEMENT OF THE CASE

01. Procedural Facts

Jamez E. Brown was charged by third amended

information filed in Thurston County Superior Court August 10, 2015, with robbery in the first degree while armed with a firearm, count I, attempting to elude a pursuing police vehicle with special allegations, count II, and two counts of assault in the third degree, counts III-IV, contrary to RCWs 9A.56.200(1)(a)(ii), 46.61.024, 9.94A.834, and 9A.36.031(1)(g), respectively. [CP 45-46].

No pretrial motions were heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 19]. Trial to a jury commenced August 24, the Honorable Erik D. Price presiding. Brown was acquitted of one count of assault in the third degree, count III, but found guilty of the remaining charges. [CP 123-27]. He was sentenced within his standard range, and timely notice of this appeal followed. [CP 136-145, 150].

02. Substantive Facts[1]

02.1 Count I: Robbery in the First Degree

On February 24, 2015, around noon, police were dispatched to the scene of a reported armed robbery at a retail outlet (Macy's) in Olympia where the suspect had just fled the scene in a red Chevrolet Camaro. [RP 170, 230, 265].[2] Eric Everett, who was sitting in his truck in the store's parking lot, saw a person, latter identified as

[1] The facts are limited to the three counts for which Brown was convicted.

[2] All references to the Report of Proceedings are to the transcripts entitled Jury Trial – Volumes 1-5.

Brown, leave the store carrying several pairs of blue jeans. [RP 110, 117, 131, 135, 660]. "I saw the person come out of there with a stack of jeans and no bag, running, just trotting at first, and then he went into a faster run." [RP 117]. When Everett confronted Brown near the latter's red Camaro, telling him to return the jeans, Brown declined and pulled what appeared to be a handgun from his pants and aimed it at Everett, saying he would shoot him. [RP 122]. "It was pointed directly at me." [RP 123]. Brown then got into his car and drove off. [RP 122]. Katy Shaw, who was standing nearby, saw Brown exit the store and point the handgun at Everett. [RP 181, 189-90, 213, 226].

02.2 Count II: Eluding with Special Allegations

Officer Mike Aalbers, who was in uniform and driving a patrol vehicle with lights and siren activated [RP 267-69, 271-72], chased Brown with several other law enforcement officers on Interstate 5. Brown was driving in an erratic manner, cutting off cars, swerving across all lanes, cutting in and out of traffic, and driving on the outside shoulders on both sides of the road. [RP 275-78, 556]. The speed of the chase reached 120 miles an hour. [RP 275, 278]. When Brown exited the freeway into Tacoma, he was pursued by additional police, who were also in uniform and driving fully equipped and marked vehicles, as he continued to drive erratically, bumping into two cars parked at a

stoplight, failing to yield, driving into oncoming traffic, and running stop signs. [RP 280-84]. At one point, two of the pursuing police vehicles collided with one another, taking them out of the pursuit. [RP 281]. Shortly after Brown abandoned the car, he was located and arrested in the parking lot of a local business, which was on the other side of the alleyway from where the car had been left. [RP 417, 427, 438-39, 542]. One of the officers identified Brown as the person who had been driving the red Camaro. [RP 494, 501]. A traffic citation issued to Brown, 10 pairs of Levi's jeans with tags and attached security devices, and a "compressed air gun" that appeared to be a real handgun were seized from the vehicle. [RP 347, 672-73, 699, 743, 745, 748].

02.3 Count IV: Assault in the Third Degree

While he was being moved by several officers into the Thurston County Jail, Brown spit on the left side of Officer George Samuelson's face. [RP 575, 623]. When the police attempted to interview Brown after his incarceration, he told them he would spit on them like he had spit on the other officer. [RP 675, 733].

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D. ARGUMENT

01. IT WAS REVERSIBLE ERROR TO INSTRUCT THE JURY ON AN UNCHARGED ALTERNATIVE MEANS OF COMMITTING THE CRIME OF ROBBERY IN THE FIRST DEGREE.

An accused must be informed of the criminal charge to be met at trial and cannot be tried for an offense that has not been charged. State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988); State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995). When a statute provides that a crime may be committed by alternative means, an information may charge one or all of the alternatives. However, when an information charges only one of the alternative means of committing a crime, it is error to instruct the jury that it may consider other alternative means by which the crime may have been committed, regardless of the strength of the evidence admitted at trial. State v. Chino, 117 Wn. App. 531, 540, 72 P.3d 256 (2003).

RCW 9A.56.190, Washington's robbery statute, sets forth two ways to commit a taking of another's personal property: taking from a victim's person or taking property in the victim's presence. State v. Roche, 75 Wn. App. 500, 511, 878 P.2d 497 (1994); State v. Nam, 136 Wn. App. 689, 705, 150 P.3d 617 (2007); State v. O'Donnell, 142 Wn. App. 314, 323, 175 P3d 1205 (2007).

Brown stood trial on a third amended information that charged him with only one of the alternative means of committing robbery in the first degree:

> In that the defendant, JAMEZ EDWARD BROWN, in the State of Washington, on or about February 24, 2015, did unlawfully take personal property from a person, against such person's will, by use or threatened use of immediate force, violence, or fear of injury to such person or their property, or the property of another, with the intent to commit theft of the property, and such force or fear having been used to obtain or retain such property or to prevent or overcome resistance to the taking, and in the commission of or immediate flight therefrom the accused displayed what appeared to be a firearm or other deadly weapon. (emphasis added).

[CP 45].

The trial court, however, instructed the jury that to convict Brown of the crime it must find that he unlawfully took personal property "from the person or in the presence of another .... (emphasis added)." [Court's Instruction 15; CP 107]. No objections were taken to this instruction. It can be inferred that the jury considered both alternative means as potential bases for this component of the offense.

Generally, an issue cannot be raised for the first time on appeal unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3). "An error is manifest when it has practical and identifiable consequences in the trial of the case." State v. Stein, 144 Wn.2d 236, 240,

27 P.3d 184 (2001). "The 'to convict' instruction carries with it a special weight because the jury treats the instruction as a 'yardstick' by which to measure a defendant's guilt or innocence." State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). Brown's constitutional right to due process is also potentially implicated by the alleged erroneous jury instruction and, assuming there was error in the jury instruction, it could have had "practical and identifiable consequences at the trial." Id. at 240. An erroneous instruction, which may have affected a criminal defendant's right to a fair trial, may be considered for the first time on appeal. State v. Fesser, 23 Wn. App. 422, 423-24, 595 P.2d 955 (1979). Brown did not propose the improper instruction,[3] he merely failed to object, and "failing to except to an instruction does not constitute invited error." State v. Corn, 95 Wn. App. 41, 56, 975 P.2d 520 (1999). Here, the error at issue is of constitutional magnitude and may be challenged for the first time on appeal. See, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990); State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996).

It was reversible error to try Brown under the uncharged alternative means of robbery in the first degree. And while such error may be deemed harmless if other instructions clearly and specifically define the

[3] Defendant's proposed instructions 9 and 10 restricted the taking of personal property "from the person of another." [CP 55, 57].

charged crime, State v. Chino, 117 Wn. App. at 540, Court's Instruction 10, the definitional instruction for robbery, also set forth the uncharged alternative means:

> A person commits the crime of robbery when he or she unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another....

[Court's Instruction 10; CP 102].

"An erroneous instruction given on behalf of the party in whose favor the verdict was returned is presumed prejudicial unless it affirmatively appears that the error was harmless (citation omitted). A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error (citation omitted)." State v. Jain, 151 Wn. App. 117, 121-22, 210 P.3d 1061 (2009), reviewed denied, 167 Wn.2d 1017 (2010).

Court's Instruction 13 reads: "'Person' includes any natural person and a corporation, a joint stock association, or an unincorporated association." [CP 105]. The State argued that Brown had committed robbery by taking personal property from another:

> So when you look at the robbery definition, has he gone ahead and stolen - - or committed the crime of theft, taking the personal property from another? The answer is "yes." We do know that the definition of "person" does include

> corporations. And Ms. Williams had indicated that Macy's is a corporation ....

[RP 885].

The problem is that Brown never took any property directly from Macy's or from any of its employees. And whether it can be claimed that he took property in the presence of Macy's, is of no consequence since that is the uncharged alternative. Even more confusing, Court's Instruction 13 fogs even that alternative because it reads "took personal property from the person or in the presence of another." [CP 107]. That could be understood to mean that Brown either took property directly from Macy's or in the presence of another person other than Macy's. This is analytically critical because under the facts of this case, as argued by the State during closing, given the above instructions, it cannot be argued that any reasonable jury would have reached the same result sans the instructional error, with the result that reversal and remand for a new trial on the crime of robbery in the first degree is required.

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02. BROWN WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO OBJECT TO OR BY ASSENTING TO THE COURT'S INSTRUCTIONS 10 AND 15 ON THE GROUND THAT THE INSTRUCTIONS INCLUDED AN UNCHARGED ALTERNATIVE MEANS OF COMMITTING THE CRIME OF ROBBERY IN THE FIRST DEGREE.[4]

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995).

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[4] While it has been argued in preceding section of this brief that an instruction that includes an uncharged alternative means of committing a crime constitutes constitutional error that may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

While the invited error doctrine precludes review of any instructional error where the instruction is proposed by the defendant, State v. Henderson, 114 Wn.2d at 870, the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. at 188.

Assuming, arguendo, this court finds that trial counsel waived the issue relating to the court's instructions 10 and 15 as previously argued herein by affirmatively assenting to the instructions or by not objecting to the instructions, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have assented to the instructions or failed to object to the instructions. For the reasons set forth in the preceding section of this brief, had counsel so objected, the trial court would not have given court's instructions 10 and 15.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self-evident: for the reasons set forth in the preceding section of this brief, but for counsel's failure to properly object to the instructions at issue or by assenting to the instructions, the trial court would not have given the instructions and the jury would have been precluded from convicting Brown based on instructions that included an uncharged alternative means of committing robbery in the first degree.

03. IT WAS REVERSIBLE ERROR WHERE THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON ALL OF THE ELEMENTS OF ROBBERY IN THE FIRST DEGREE.

A criminal defendant has the right to have the jury base its decision on an accurate statement of the law applied to the facts of the case. State v. Miller, 131 Wn.2d 78, 90-92, 929 P.2d 372 (1997). Essential elements of a crime are those the prosecution must prove to sustain a conviction. State v. Peterson, 168 Wn.2d 763, 772, 230 P.3d 588 (2010). A jury instruction is erroneous if it relieves the State of its burden

to prove every element of a crime. State v. DeRyke, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003). The fact that another instruction contains the missing essential element will not cure the error caused by the element's absence from the to-convict instruction. Id. at 910. The omission of an element of a charged offense is a manifest error affecting a constitutional right that can be considered for the first time on appeal. State v. Mills, 154 Wn.2d at 6; RAP 2.5(a).

The Court's Instruction 15, which tracked the language of WPIC 37.02,[5] reads in pertinent part:

> To convict the defendant of the crime of robbery in the first degree as charged in Count I, each of the following six elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about February 24, 2015, the defendant unlawfully took personal property from the person or in the presence of another;
>
> (2) That the defendant intended to commit theft of the property;
>
> (3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person, or to that person's property, or to the person or property of another;
>
> (4) That force or fear was used by the defendant to obtain or retain possession of the property, or to prevent or overcome resistance to the taking;
>
> (5) That in the commission of these acts, or in the immediate flight therefrom, the defendant displayed what appeared to be a firearm or other deadly weapon ....

[5] 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 37.02, at 667 (3d ed. 2008).

[CP 107].

In State v. Richie, 191 Wn. App. 916, 928-930, 365 P.3d 770 (2015), this court reversed a robbery conviction and remanded for a new trial because the same to-convict instruction failed to allege the non-statutory/common law element that the victim had an ownership, representative, or possessory interest in the property taken. In Richie, Richie entered a Walgreen's store, removed two bottles of brandy from the shelves, and walked toward the front of the store, holding one bottle by the neck in each hand. As he approached, Gouveia—a store employee in line at the register, not yet on the clock, and who still wore a coat covering her uniform—took a few steps back from the checkout counter. Richie walked between the checkout counter and Gouveia. When Gouveia told Richie he needed to pay and reached for the bottles, Richie hit Gouveia on the head with one of the bottles. Gouveia then grabbed for the other bottle, and Richie ran out of the front door dragging Gouveia, who was still holding on to the bottle in Richie's hand. Richie eventually broke away from Gouveia and drove off. Id. at 920-21.

In finding reversible error, this court reasoned that the error was not harmless beyond a reasonable, observing that "the evidence was ambiguous" on the issue of whether Gouveia had an ownership, representative or possessory interest in the stolen property. While the

evidence was sufficient to find Gouveia was acting as a representative of Walgreens, there was evidence that Gouveia was not on duty and should be treated as a customer rather than an employee. As a result, the instructional error was not harmless. Id. at 929-930.

The result is no different here. The to-convict instruction omitted the same essential element as the instruction in Richie. And the evidence was similarly ambiguous. As previously argued, contrary to the prosecutor's closing argument, Brown never took any property from Macy's or from any of its employees. And any claim that the property was taken in the presence of Macy's fails because that element was the uncharged alternative. And any part that Everett played is of no consequence given that he was not an employee or representative of Macy's. As in Richie, the evidence, closing argument, and to-convict instruction render it ambiguous as to whether the jury could have convicted on legally improper grounds. Reversal is required.

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04. BROWN WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S PROPOSAL OF A TO-CONVICT INSTRUCTION FOR ROBBERY IN THE FIRST DEGREE THAT OMITTED AN ESSENTIAL ELEMENT OF THE OFFENSE.[6]

Brown's counsel proposed a to-convict instruction for robbery in the first degree that was almost identical to the the Court's Instruction 15 for the same offense that omitted an essential element of the offense. The defendant's proposed jury instruction 11 reads as follows:

> To convict the defendant of the crime of robbery in the first degree as charged in Count I, each of the following six elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about February 24, 2015, the defendant unlawfully took personal property from the person of another;
>
> (2) That the defendant intended to commit theft of the property;
>
> (3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person, or to that person's property, or to the person or property of another;
>
> (4) That force or fear was used by the defendant to obtain or retain possession of the property prevent or overcome resistance to the taking;
>
> (5) That in the commission of these acts, or in the immediate flight therefrom, the defendant displayed what appeared to be a firearm or other deadly weapon ....

[CP 57; Defendant's Proposed Jury Instruction 11].

Should this court find that trial counsel waived the issue

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[6] For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel presented earlier herein is hereby incorporated by reference.

set forth in the preceding section of this brief relating to the to-convict instruction for robbery in the first degree by inviting error in proposing a to-convict instruction that also omitted the essential element that the victim had an ownership, representative, or possessory interest in the property taken, then both elements of ineffective assistance of counsel have been established.

First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have offered the instruction. Second, the prejudice is self-evident for the reasons set forth in the preceding section. Counsel's performance was deficient, with the result that Brown was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his conviction for robbery and remand for retrial.

05. A CONVICTION FOR ROBBERY IN THE FIRST DEGREE PURSUANT TO AN INFORMATION THAT FAILS TO ALLEGE ALL OF THE ESSENTIAL ELEMENTS OF THE OFFENSE MUST BE REVERSED.

The constitutional right of a person to be informed of the nature and cause of the accusation against him or her requires that every material element of the offense be charged with definiteness and certainty. 2 C. Torcia, Wharton on Criminal Procedure Section 238, at 69 (13th ed. 1990). In Washington, the information must include the essential common law elements, as well as the statutory elements, of the crime

charged in order to apprise the accused of the nature of the charge. Sixth Amendment; Const. art. 1, Section 22 (amend. 10); CrR 2.1(b); State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991). Charging documents that fail to set forth the essential elements of a crime are constitutionally defective and require dismissal, regardless of whether the defendant has shown prejudice. State v. Hopper, 118 Wn.2d 151, 155, 822 P.2d 775 (1992). If, as here, the sufficiency of the information is not challenged until after the verdict, the information "will be more liberally construed in favor of validity...." Kjorsvik, 117 Wn.2d at 102. The test for the sufficiency of charging documents challenged for the first time on appeal is as follows:

> (1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?

Kjorsvik, 117 Wn.2d at 105-06.

It is not fatal to an information that the exact words of the statute are not used; it is instead sufficient "to use words conveying the same meaning and import as the statutory language." State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). The information must, however, "state the acts constituting the offense in ordinary and concise language ...." State v. Royse, 66 Wn.2d 552, 557, 403 P.2d 838 (1965). The question "is whether

the words would reasonably apprise an accused of the elements of the crime charged." Kjorsvik, 117 Wn.2d at 109.

> The primary purpose (of a charging document) is to give notice to an accused so a defense can be prepared. (citation omitted). There are two aspects of this notice function involved in a charging document: (1) the description (elements) of the crime charged; and (2) a description of the specific conduct of the defendant which allegedly constituted the crime.

Auburn v. Brooke, 119 Wn.2d 623, 629-30, 836 P.2d 212 (1992).

Brown was charged with robbery in the first degree in the third amended information, which reads in pertinent part:

> In that the defendant, JAMEZ EDWARD BROWN, in the State of Washington, on or about February 24, 2015, did unlawfully take personal property from a person, against such person's will, by use or threatened use of immediate force, violence, or fear of injury to such person or their property, or the property of another, with the intent to commit theft of the property, and such force or fear having been used to obtain or retain such property or to prevent or overcome resistance to the taking, and in the commission of or immediate flight therefrom the accused displayed what appeared to be a firearm or other deadly weapon.

[CP 45].

Citing State v. Hall, 54 Wash. 142, 102 P. 888 (1909) and State v. Latham, 35 Wn. App. 862, 670 P.2d 689 (1983) and State v. Tvedt, 153 Wn.2d 705, 107 P.3d 728 (2005), this court, as noted above, recently held that an essential, implied element of robbery includes the non-statutory/common law element that the victim have an ownership,

representative, or a possessory interest in the property stolen. State v. Richie, 191 Wn. App. at 924. By failing to list this element, the third amended information in this case failed to apprise Brown of the nature of the charge of robbery in the first degree as alleged in count I. And as the information cannot be construed to give notice or to contain in some manner all of the essential elements of the offense of robbery, it is defective, and even the most liberal reading cannot cure it. See State v. Satterthwaite, 186 Wn. App. 359, 362, 344 P.3d 738 (2015). The conviction for robbery in the first degree obtained on this amended information must be reversed. State v. Kitchen, 61 Wn. App. 911, 812 P.2d 888 (1991). Brown need not show prejudice, since Kjorsvik calls for a review of prejudice only if the "liberal interpretation" upholds the validity of the information. See State v. Kjorsvik, 117 Wn.2d 93 at 105-06.

06. AS A MATTER OF LAW, THE TRIAL COURT ERRED IN IMPOSING A SENTENCE THAT EXCEEDED THE STATUTORY MAXIMUM FOR THE CRIME OF ASSAULT IN THE THIRD DEGREE.

The Washington Supreme Court has held that that a sentence in excess of statutory authority is subject to collateral attach and "that a defendant cannot agree to punishment in excess of that which the

Legislature has established." In re Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). In defining the limitations to this holding, the court, citing State v. Majors, 94 Wn.2d 354, 616 P.2d 1237 (1980) as instructional, went on to explain that waiver does not apply where the alleged sentencing error is a legal error leading to an excessive sentence, as opposed to where the alleged error "involves an agreement to facts (e.g., agrees to be designated as habitual offender in hopes of obtaining a shorter sentence), later disputed, or if the alleged error involves a matter of trial court discretion." Id.

A trial court may only impose sentences that statutes authorize. State v. Albright, 144 Wn. App. 566, 568, 183 P.3d 1094 (2008). This court reviews issues of statutory construction de novo as a question of law. State v. Wilson, 170 Wn.2d 682, 687, 244 P.3d 950 (2010).

In addition to sentencing Brown to 60 months for his conviction for assault in the third degree, which was to run concurrent with his 160 month sentence for robbery in the first degree, the trial court imposed community custody on the assault conviction for the longer of any term of early release or 12 months. [CP 140-41].

Under RCW 9.94A.701(1)-(3), a court may not sentence an offender to a variable term of community custody contingent on the amount of earned release, but instead must determine the precise length of

community custody at the time of sentencing. State v. Franklin, 172 Wn.2d 831, 836, 263 P.3d 585 (2011). Brown's sentence violates this statute because it exceeds the statutory maximum sentence of five years imprisonment. See RCW 9A.20.021 and 9A.36.031. On remand, the trial court should impose the proper statutory community custody term within the five-year statutory maximum for assault in the third degree, a class C felony.

E. CONCLUSION

Based on the above, Brown respectfully requests this court to reverse his conviction for robbery and remand for a new trial and resentencing consistent with the arguments presented herein.

DATED this 3rd day of June 2016.

Thomas E. Doyle

THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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DATED this 3rd day of June 2016.

Thomas E. Doyle

THOMAS E. DOYLE
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DOYLE LAW OFFICE

June 03, 2016 - 3:16 PM

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